Supreme Court, U.S.
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No. 98-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

BOB T. MOORE AND SUSAN MOORE,

Petitioners,

v.

ASHLAND CHEMICAL, INC. AND ASHLAND OIL, INC.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

After conducting a *Daubert* analysis, a district court excluded a clinical physician's causation testimony, finding that it lacked reliability and relevance. Applying *Daubert* and this Court's recent decision in *General Electric Co. v. Joiner*, the Fifth Circuit found no abuse of discretion in the district court's ruling. Does the Fifth Circuit's decision create an intercircuit conflict or provide any other reason for granting certiorari?

STATEMENT PURSUANT TO RULE 29.6

Respondent Ashland Chemical, Inc. was merged into Ashland Oil, Inc. in September 1993. The name of Respondent, Ashland Oil, Inc., was changed in January 1995, to Ashland Inc. The correct, current names of Respondents are therefore Ashland Inc. and Ashland Chemical Company, a division of Ashland Inc. Other nonwholly owned subsidiaries of Ashland Inc. are:

APAC Holdings, Inc.
Arch Coal, Inc.
Marathon Ashland Petroleum LLC

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STATEMENT OF THE CASE

A. Overview

The Plaintiffs in this case (here Petitioners) are the Moores, a husband and wife, who claim that Mr. Moore developed reactive airways dysfunction syndrome ("RADS") as a result of a single exposure to fumes from a product known as Release Coating, which contained toluene and other solvents. Mr. Moore, a truck driver, was delivering drums of Release Coating to a facility owned by Respondent Ashland Chemical, Inc. The alleged exposure occurred during a period of 45 minutes to an hour, as Mr. Moore and an Ashland Chemical employee cleaned up a leak of the product from a drum in the back of Mr. Moore's truck.[1] Petitioners sued both Ashland Chemical and Ashland Oil, Inc. (collectively "Ashland").

Although Petitioners blamed the Release Coating leak for Mr. Moore's respiratory problems, he had a long history of pulmonary illness. As a child, he had suffered from asthma. And during the week immediately before the delivery to Ashland, he had been ill with pneumonia. For many years, he had smoked cigarettes heavily, and he was still smoking at the time of trial.[2] Faced with the question whether Ashland's negligence, if any, proximately caused his injury, the jury answered "No."[3]

The only argument raised by Petitioners in this Court is that the district court abused its discretion in excluding the causation testimony of Dr. Daniel Jenkins, one of their two medical experts. The trial judge allowed Dr. Jenkins to testify about his examination, testing, and diagnosis of Mr. Moore, and to opine that Mr. Moore had RADS. And Mr. Moore's primary treating physician, Dr. Antonio Alvarez, testified about diagnosis, treatment, and causation.

Before trial, the district court held a *Daubert* hearing, at which Petitioners declined to present any live testimony.[4] Nevertheless, during trial, the court allowed them another chance to meet the *Daubert* requirements. In excluding the causation portion of Dr.

1. App. 3a-4a.
2. App. 4a, 21a.
3. App. 5a.
4. *See* App. 140a.

Jenkins's testimony, the court noted that he had no scientific support, no literature, and no research underlying his causation theory; further, Dr. Jenkins knew of no other patient who had developed RADS from exposure to toluene or other similar substances.[5] The court further noted that Dr. Jenkins had an insufficient basis for his proffered opinion testimony because he had no information about the "level of exposure, amount of exposure, and duration of exposure."[6] As the Fifth Circuit concluded, the trial court's ruling was not an abuse of discretion: "In sum, Dr. Jenkins could cite no scientific support for his conclusion that exposure to any irritant at unknown levels triggers this asthmatic-type condition."[7]

The en banc majority opinion, reprinted in Appendix A of the petition, contains a thorough statement of the detailed facts and evidence underlying the district court's exclusion of Dr. Jenkins's causation testimony. Respondents adopt this statement of the facts by reference.

B. Inaccuracies and Omissions in Petitioners' Factual Statements

The following list points out the most significant misstatements and omissions in the Petitioners' representations of the pertinent facts:

1. Page 2: Contrary to Petitioners' implication that Mr. Moore alone cleaned up the leak in the back of the trailer, at least one Ashland employee worked with him on the cleanup.[8]

2. Page 2: Contrary to the one-sided statement that Mr. Moore developed RADS "during the one-hour exposure," the experts expressed different opinions about how and when he developed his

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5. App. 141a. During the voir dire, on direct examination, Dr. Jenkins admitted that he knew of no literature indicating that toluene causes RADS. He acknowledged this again on cross-examination. Finally, on redirect examination, the Moores' attorney showed him a case report concerning one patient who had developed RADS after exposure to toluene and other substances for over two hours. App. 133a n.4. The other substances and the circumstances of exposure were markedly different from those involved here. *See id.*

6. App. 142a.

7. App. 21a.

8. App. 3a-4a.

lung condition. The defense expert, Dr. Jones, testified that the condition likely resulted from Mr. Moore's preexisting asthma, his recent bout of pneumonia, and his 20-year, ongoing smoking habit.[9]

3. Pages 2 and 3: Petitioners suggest that the district court excluded Dr. Jenkins's causation testimony solely because there was no "scientific literature establishing a causal link between exposure to the toluene mixture and RADS." Contrary to this statement, the district court considered several other factors before excluding Dr. Jenkins's causation testimony, including: (1) his lack of knowledge of any other patient whose lung condition was caused or aggravated by exposure to toluene solution; and (2) his lack of knowledge of the level of Mr. Moore's exposure.[10]

4. Page 2: Petitioners cite a footnote of the dissenting opinion (en banc) for the proposition that Dr. Jenkins had "diagnosed the cause" of over 100 patients' exposure injuries. But the cited footnote does not support this statement. Instead, it notes that Dr. Jenkins had "examined and evaluated over 100 persons for injuries occurring from exposure to various chemical compounds in an occupational setting."[11] The phrase "diagnose the cause," which is used several times throughout the petition, improperly merges the concept of diagnosing a condition with the very different concept of identifying its cause.

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9. App. 8a-9a.

10. App. 140a-142a.

11. *See* App. 46a n.7.

REASONS FOR DENYING THE WRIT

A. The Fifth Circuit applied a straightforward abuse-of-discretion review to an evidentiary ruling on the admissibility of medical causation testimony.

Although issued by the Fifth Circuit en banc, the opinion below is decidedly uncontroversial. Applying *Joiner*'s recent clarification of the standards under *Daubert* and Rule 702, the Fifth Circuit found no abuse of discretion in the district court's exclusion of the medical causation testimony of one of the Plaintiffs' two physician-experts.[12] As the en banc court explained: "In evaluating whether the district court abused its discretion in excluding Dr. Jenkins's testimony on causation, the Supreme Court's decisions in *Daubert* and *Joiner* control our analysis."[13]

What *was* controversial was the earlier opinion of a sharply divided panel. The two-member majority had reversed and remanded the judgment entered on the jury verdict, holding that the district court had abused its discretion in excluding the causation testimony of Dr. Jenkins.[14] According to the panel majority, the *Daubert* factors apply only to "hard Newtonian" science, and not to clinical medicine.[15] It based this conclusion on two assumptions: (1) that the kind of reasoning physicians use in diagnosing and treating patients is not scientific; and (2) that the kind of speculative judgments sometimes necessary for diagnosis and treatment can also be used to establish medical causation.[16]

Judge Eugene Davis strongly dissented, noting: "I thoroughly disagree" with the majority's conclusion.[17] As Judge Davis explained,

> all our post-*Daubert* cases, along with those of our sister circuits, consistently recognize that the admission of a physician's testimony on medical causation is governed by *Daubert*'s requirements, thus announcing in a voice that is

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12. *See* App. 21a-22a. *See generally General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); Fed. R. Evid. 702.

13. App. 9a (internal citations omitted).

14. *See* App. 97a, 100a, 109a.

15. *See* App. 54a, 69a.

16. *See* App. 54a, 69a-72a.

17. App. 121a.

loud and clear that such testimony is indeed 'scientific' expert testimony.[18]

Furthermore, as Judge Davis observed, one "need go no further than *Daubert* itself to demonstrate the fallacy of [the panel majority's] conclusion."[19] Indeed, the *Daubert* Court had specifically considered expert testimony on the alleged causal connection between exposure to the drug Bendectin and birth defects.[20] The subject of that testimony — medical causation — "was obviously considered 'scientific' by the Court."[21]

For its "nonscience" view of medicine, the two-member panel majority relied on a book by Professor Alvan R. Feinstein.[22] But during the en banc phase of the case, Dr. Feinstein filed an amicus brief making clear that his book does not support the panel's decision to apply different standards to medical causation testimony offered by a clinical physician.[23]

Almost immediately after the issuance of the panel opinion, the Fifth Circuit granted en banc rehearing on its own motion and vacated the panel opinion.[24] The reasons for rehearing were apparent. First, the panel majority had announced a radically new standard — that the *Daubert* factors do not apply to medical causation testimony of a clinical physician.[25] Second, the panel majority had created a conflict, not only with other circuit-court decisions, but also with *Daubert* itself.[26]

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18. App. 126a.

19. App. 123a.

20. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 582-83, 113 S. Ct. 2786, 2791 (1993).

21. App. 123a.

22. *See* App. 69a-72a (citing Alvan R. Feinstein, *Clinical Judgment* (1967)).

23. *See* Brief of *Amicus Curiae* Professor Alvan R. Feinstein in Support of Neither Appellants nor Appellees, Cause No. 95-20492, *Moore v. Ashland Chemical, Inc.*, in the United States Court of Appeals for the Fifth Circuit.

24. *See* App. 51-52a; Fifth Circuit Local Rule 41.3.

25. *See* App. 68a-72a.

26. *See* App. 123a (Davis, J., dissenting) (noting that the majority panel opinion conflicted with *Daubert*).

By a 12-to-3 margin, the en banc Fifth Circuit reinstated the judgment on the jury's take-nothing verdict, finding no abuse of discretion in the trial court's exclusion of the causation portion of one physician's testimony.[27] In reaching this conclusion, the majority of the en banc court considered and evaluated in detail the evidence before the district court at the time it made its ruling. Applying *Daubert* and the recently decided *Joiner* case, the en banc Fifth Circuit appropriately conducted a straightforward abuse-of-discretion review based on the specific facts of this case.[28] Such fact-based decisions are not appropriate for certiorari consideration in the absence of "a marked departure by a lower court in the application of established law."[29]

B. Petitioners mischaracterize the analyses and holdings of the opinions below.

The petition presents a distorted view of the analyses and holdings of the Fifth Circuit panel and en banc opinions. Specifically, Petitioners mischaracterize several statements in the majority en banc opinion as broad holdings "as a matter of law" about the general admissibility and relevance of certain types of evidence. Contrary to these contentions, the Fifth Circuit's en banc holding in this case is a narrow one — it is limited to the decision that, based on the specific evidence before the district court, the exclusion of Dr. Jenkins's causation testimony did not constitute an abuse of its discretion. Similarly, Petitioners mischaracterize the earlier divided panel opinion by failing to account for the applicable abuse-of-discretion standard of review.

The list that follows points out the most significant misstatements and omissions in the Petitioners' representations about the analyses and holdings of the opinions below. Many of these misstatements

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27. *See* App. 21a-22a; *see also* App. 1a & 22a-23a (showing that ten judges joined in the majority opinion, two judges concurred, and three judges dissented).

28. *See* App. 9a, 17a-21a (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997)).

29. *General Council of United Methodist Church v. Superior Court of California*, 439 U.S. 1369, 1373-74, 99 S. Ct. 35, 38-39 (1978).

appear not only in the Petitioners' argument, but also in their Statement of Facts.

1. Page 3: Contrary to Petitioners' statement, the majority en banc court did *not* hold "that Dr. Jenkins' causation testimony was unreliable and not admissible under *Daubert*." Instead, the court's holding is as follows: "*Daubert* and its progeny give the district court discretion to 'keep the gate' for the purpose of admitting or excluding opinion testimony. In this case, the district court did not abuse its discretion in concluding that the causation evidence proffered by Dr. Jenkins should be excluded."[30]

2. Page 4: Petitioners claim that the two-member panel majority "followed the Second, Third, Fourth and other circuits" to hold that a clinical physician may, consistently with *Daubert*, express a medical causation opinion "without hard scientific corroboration." But the panel majority did not hold merely that a clinical physician "may" express an opinion. Instead, it held that the district court "manifestly erred, clearly erred, and abused its discretion" by excluding the medical causation testimony of one of the plaintiffs' two causation experts.[31] The panel majority reached this decision even though the district court had based its ruling on a *Daubert* hearing, a fact-specific analysis, and its conclusion under Rule 702 that the causation opinion lacked a reliable foundation and was insufficiently tied to the facts of this case.

3. Pages 5, 19, and 22: The en banc majority did not, as Petitioners contend, hold "as a matter of law that Dr. Jenkins was required to have direct evidence by scientifically accurate data of the level of Mr. Moore's exposure." Nor did it broadly hold, as Petitioners claim, "that a clinical medical doctor cannot testify to the cause of a patient's inhalation injuries from an accidental exposure to industrial chemicals without confirmatory scientific literature." Instead, the en banc court held that the district court did not abuse its discretion in excluding the medical causation testimony of Dr. Jenkins when there was: (1) no scientific support for his general causation theory that exposure to a toluene solution at any level would cause RADS; (2) no support for his specific causation theory because there was no

30. App. 22a.

31. App. 100a; *see* App. 109a.

accurate information about Mr. Moore's level of exposure; and (3) no comparison of the toluene solution to any other chemical to which RADS had ever been scientifically linked.[32]

4. Pages 5 and 21: The en banc majority did not, as Petitioners contend, hold "as a matter of law that an MSDS can provide no support for a causation opinion" or hold anything else "as a matter of law" about an MSDS generally. Instead, the opinion plainly limits its focus to the specific Dow MSDS on which Dr. Jenkins purported to base his causation opinion in this case:

> The district court was entitled to find that the Dow MSDS had *limited value* to Dr. Jenkins. First, Dr. Jenkins admitted that he did not know what tests Dow had conducted in generating the MSDS. Second, and perhaps more importantly, Dr. Jenkins had no information on the level of exposure necessary for a person to sustain the injuries about which the MSDS warned. The MSDS made it clear that the effects of exposure to Toluene depended on the concentration and length of exposure.[33]

5. Pages 5 and 21: The en banc majority did not, as Petitioners assert, hold "as a matter of law . . . that the temporal connection between exposure and outset of symptoms is entitled to 'little weight' " or "has no significance." Instead, the opinion explains that in some circumstances, the temporal connection between exposure and injury may be so compelling that there is no need for reliance on standard toxicology methods.[34] For example, as the court noted, a temporal connection may be sufficient if a plaintiff has been "doused with jet fuel" or if there has been a mass exposure to a chemical by many people, who in turn suffer similar symptoms.[35] But absent such circumstances, as the court added, a temporal connection, "*standing alone*, is entitled to little weight in determining causation."[36]

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32. *See* App. 20a-22a.

33. App. 19a (emphasis added).

34. *See* App. 19a

35. App. 19a.

36. App. 20a (emphasis added).

6. Pages 11-12: The en banc majority did not, as Petitioners contend, issue a "holding . . . that a clinical medical doctor's testimony based on 'experience or training' is not reliable unless it satisfies the *Daubert* factors." The footnote cited for such a "holding" actually makes two points: (1) medical causation testimony — the type involved in both *Daubert* and *Joiner* — involves a "scientific exercise" and is subject to the *Daubert* admissibility standards, and (2) assuming that some "hard science" distinction exists, the *Daubert* factors may still apply, even if the expert testimony is based on experience or training.[37]

C. No intercircuit conflict arises from the Fifth Circuit's abuse-of-discretion review of a district court's exclusion of evidence under *Daubert*.

Petitioners argue that the en banc decision in this case conflicts with at least nine different decisions from at least six other circuits.[38] In most cases, the purported conflict lies in a single distinction — that in the "conflicting" case, no abuse of discretion occurred in the *admission* of certain testimony, while in the present case, no abuse of discretion occurred in the *exclusion* of one doctor's causation testimony.

As this Court explained in *Joiner*, exactly the same broad abuse-of-discretion standard applies to rulings allowing expert testimony as to rulings disallowing it.[39] Thus, even if the expert testimony, the underlying support, the methodology, and the "fit" were in some ways similar in two different cases, one trial court might properly exercise its discretion to admit the testimony, while the other might properly exercise its discretion to exclude it. In turn, the two reviewing circuit courts might both properly find no abuse of discretion in the lower-court rulings, without creating the slightest intercircuit conflict.

The first section below addresses those purported "conflicting opinions" in which the trial court's rulings are upheld as a proper exercise of discretion. The second section addresses the purported

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37. App. 12a n.6.

38. *See* Pet. at 8-12.

39. *General Elec. Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 517 (1997).

conflicts in which a circuit court finds an abuse of discretion and reverses a *Daubert* ruling. The Fifth Circuit's en banc opinion creates no meaningful conflict with any of them.

1. Opinions in Which No Abuse of Discretion Was Found in Admission of Causation Testimony

a. Zuchowicz v. United States, 140 F.3d 381 (2d Cir. 1998)

In *Zuchowicz*, a woman was prescribed twice the recommended dose of Danocrine, a drug used to treat endometriosis.[40] Shortly after taking this overdose daily for a month, she developed primary pulmonary hypertension (PPH), a rare disease often caused by certain medications. While waiting for a lung transplant, she died. There were no formal studies linking a Danocrine overdose to PPH.[41]

The trial court admitted the testimony of the plaintiff's two causation experts, and the Second Circuit affirmed under an abuse-of-discretion standard. These two experts — the treating physician and an expert in drug-induced pulmonary diseases — testified that the Danocrine overdose had caused PPH based on the following facts and reasoning, all of which starkly contrast with those in the present case:

(1) Zuchowicz was a healthy, active young woman with no history of cardiovascular problems.

(2) Zuchowicz first developed symptoms of PPH shortly after the overdose.

(3) Based on Zuchowicz's history, the doctor had ruled out other possible causes of PPH, including all previously known drug-related causes of PPH.

(4) The progression and timing of Zuchowicz's disease corresponded with other accepted cases of drug-induced PPH.[42]

The Second Circuit also affirmed the trial court's admission of the testimony of a pharmacology professor who had published articles

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40. *See Zuchowicz v. United States*, 140 F.3d 381, 384 (2d Cir. 1998).

41. *See id.* at 385.

42. *See id.* at 385-86.

on the effects of drugs on vascular tissues.[43] He gave a step-by-step scientific explanation of hormonal changes that led to PPH. This reasoned analysis sharply differs from the conclusory, speculative causation testimony of Dr. Jenkins.

Like the Fifth Circuit in the present case, the Second Circuit in *Zuchowicz* applied the *Daubert* factors, among others, in assessing the causation testimony of a clinical physician. Under an abuse-of-discretion standard, both courts affirmed the trial courts' evidentiary rulings. These two opinions plainly create no intercircuit conflict.

b. McCullock v. H.B. Fuller Company, 61 F.3d 1038 (2d Cir. 1995)

In *McCullock*, the plaintiff had worked for 16 years in a book bindery, where she claimed she was exposed to harmful fumes from an unventilated glue pot.[44] The glue's warning label called for a ventilation system over the glue pot and warned of health or respiratory problems associated with the glue fumes. During the four years in which McCullock worked near the glue pot, she developed respiratory problems.[45] The trial court admitted the testimony of a consulting engineer, who testified that McCullock's station was within the zone of exposure, and a medical doctor, who testified that chronic, repeated inhalation of fumes from the hot-glue pot had caused McCullock's illness.[46]

As in *Zuchowicz* and *Moore*, the *McCullock* court recognized that the admissibility of expert testimony "is left to the broad discretion of the trial judge and will be overturned only when manifestly erroneous."[47] And the *McCullock* court likewise concluded that the trial court's flexible assessment should be guided by the listed *Daubert* factors, among others.[48] The *McCullock* court, like the *Zuchowicz*

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43. *See id.* at 385.

44. *See McCullock v. H.B. Fuller Company*, 61 F.3d 1038, 1040 (2d Cir. 1995).

45. *See id.* at 1041.

46. *See id.* at 1041-42.

47. *Id.* at 1042.

48. *See id.*

and *Moore* courts, found no abuse of discretion in the admissibility rulings.[49]

Given the limited analysis in *McCullock*, it is difficult to compare the underlying basis of the medical expert's testimony with the alleged basis for Dr. Jenkins's causation opinion. It is clear, nonetheless, that the facts in *McCullock* are vastly different from those in *Moore*. For example:

(1) McCullock suffered from a four-year daily exposure to the fumes from an unventilated glue pot.

(2) At least two written sources specifically warned of the need for a ventilation system over the glue pot.

(3) McCullock first experienced throat symptoms during the four-year period of her prolonged exposure.

Moreover, the fact that the *McCullock* court found no abuse of discretion in the admission of the expert testimony does not mean that the court would necessarily have found an abuse of discretion if the same testimony had been excluded. Indeed, in an earlier appeal of the same case, the Second Circuit found no abuse of discretion in the trial court's exclusion of a portion of the engineer's testimony.[50]

c. Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378 (4th Cir. 1995)

In *Benedi*, the plaintiff, who consumed alcohol daily, had been taking Tylenol (acetaminophen) for flu-like aches. He was admitted to the hospital in a coma and near death from liver and kidney failure, and ultimately required an emergency liver transplant.[51]

Benedi sued the Tylenol manufacturer, and at trial, he presented two liver disease specialists who cited "numerous treatises and articles published in medical journals . . . that describe the increased risk of liver injury when acetaminophen is combined with alcohol."[52] One

49. *See id.* at 1042-44.

50. *See id.* at 1041.

51. *See Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1381 (4th Cir. 1995).

52. *Id.* at 1382.

expert referred to "sixty reports that [the defendant] had received by the end of 1992 documenting cases of liver injury associated with combining therapeutic doses of Tylenol with alcohol."[53]

Thus, in *Benedi* — unlike in the present case — general causation was amply supported in the medical literature. Moreover, after examining Benedi's damaged, removed liver, a pathologist, the transplant surgeon, and several liver disease specialists concluded that the liver injury was characteristic of acetaminophen toxicity.[54] As the experts also noted, acetaminophen was found in the plaintiff's blood upon his admission to the hospital, and he had a history of Tylenol use with regular alcohol consumption. They found additional support in his liver enzyme blood level and in the absence of evidence of other causes of liver failure. Thus, both the factual basis and the experts' reasoning in *Benedi* contrast sharply with Dr. Jenkins's speculative opinion in the present case.

Most important for purposes of the present analysis, the *Benedi* court recognized that the *Daubert* factors apply to the medical causation testimony of expert physicians. The court further noted that the *Daubert* analysis is a flexible one, premised on "the ability of federal judges to properly determine admissibility."[55] And like the courts in the cases discussed above, the *Benedi* court concluded that the trial court had "acted within its discretion" in allowing the expert testimony.[56]

d. Clark v. Heidrick, 150 F.3d 912 (8th Cir. 1998)

In *Clark*, the Eighth Circuit — noting the "clear abuse of discretion" standard — affirmed both the admission of the defendants' causation testimony and the exclusion of the plaintiffs' causation testimony.[57] The defense expert testified that he could not determine with reasonable certainty what had caused an infant's injury during delivery. Thus, unlike Dr. Jenkins's conclusory opinion on the alleged cause of Mr. Moore's respiratory injury, this expert merely admitted

53. *Id.*

54. *See id.*

55. *Id.* at 1384.

56. *Id.* at 1385.

57. *See Clark v. Heidrick*, 150 F.3d 912, 914-15 (8th Cir. 1998).

that among several possible causes of the infant's paralysis, he could not identify the actual cause.

On rebuttal, the plaintiffs offered testimony that flexion was the most likely cause.[58] The Eighth Circuit affirmed the exclusion of that evidence, noting the trial court's broad discretion to disallow rebuttal testimony. Moreover, as the court observed, the evidentiary exclusion, even if incorrect, constituted harmless error because the evidence was cumulative.[59] In the same way, Dr. Jenkins's causation testimony was cumulative of the causation testimony of Dr. Alvarez. Indeed, on the causation issue, the two doctors' testimony was virtually identical.[60]

Clark provides little analysis of the underlying bases for the two experts' causation opinions. Without citing or discussing either *Daubert* or *Joiner*, the opinion does little more than recognize the broad discretion afforded a trial court to admit or exclude expert testimony.

e. Hose v. Chicago Northwestern Transp. Co., 70 F.3d 968 (8th Cir. 1995)

In *Hose*, the Eighth Circuit affirmed the trial court's exercise of discretion in admitting the testimony of three physician experts.[61] Again, as in most of the cases discussed above, the court recognized that this evidence was "scientific" testimony for which *Daubert* provides the standard.[62] And again, the facts in *Hose* differ from those in the present case.

The plaintiff had worked for the defendant as a welder for 15 years, during which he was exposed to "substantial amounts of fumes and dust containing manganese, a toxin."[63] Further, he had been diagnosed with manganese encephalopathy, a dementia that "usually results from chronic exposure to manganese, and is usually associated

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58. *See id.* at 915.

59. *See id.*

60. *See* App. 137a.

61. *See Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 973-74 (8th Cir. 1995).

62. *See id.* at 972.

63. *Id.*

with reduced ability to control one's movements."[64] Thus, unlike RADS, which had never been associated with a brief exposure to toluene or any similar chemical, encephalopathy had been firmly linked with chronic exposure to manganese.

Only one of the three experts actually testified that Hose's chronic exposure to manganese had caused him to develop manganese encephalopathy. The doctor testified to this conclusion three times without objection; defense counsel finally objected when the testimony was elicited the fourth time. Assuming that the objection was timely, the Eighth Circuit found no abuse of discretion in the court's decision to overrule it.[65] The testimony was found to have a sufficient factual basis because, in addition to patient history, the expert had relied on:

(1) laboratory studies showing elevated levels of manganese in Hose's body and on his work clothes;

(2) clinical examinations of Hose showing physical impairment;

(3) a series of MRIs suggesting the presence of manganese in Hose's brain; and

(4) reports from other doctors showing memory loss, sensory loss, slow cognition, and other symptoms of manganese encephalopathy.[66]

Given that chronic manganese exposure had been linked to encephalopathy and that scientific tests had shown elevated manganese levels in Hose, the conclusion was not speculative, as was the causation conclusion of Dr. Jenkins.

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64. *Id.*

65. *See id.* at 974.

66. *See id.*

2. Opinions in Which an Abuse of Discretion Was Found in Exclusion of Causation Testimony

a. Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248 (1st Cir. 1998)

In *Baker*, the First Circuit found an abuse of discretion in the trial court's exclusion of an alternative causation theory.[67] In the early 1970s, the plaintiff had developed pelvic inflammatory disease (PID) and later infertility, which her experts opined had resulted from her use of a Dalkon Shield IUD. The trial court excluded the testimony of the defendant's two expert gynecologists, who proposed to testify that the plaintiff's PID was more likely caused by chlamydia, a sexually transmitted disease.[68] The trial court concluded that there was no basis for this theory.

While recognizing that a trial court has "broad discretion in determining issues of admissibility of expert testimony and scientific evidence,"[69] the First Circuit found an abuse of discretion in excluding the testimony because the alternative causation theory rested on the following underlying bases:

(1) Scientific studies showed that the most common causes of PID are gonorrhea and chlamydia.

(2) The plaintiff's PID was not of the acute type caused by gonorrhea, and there was no evidence of gonorrhea.

(3) Tests from the early 1970s revealed that the plaintiff had trichomonas, a sexually transmitted disease, and the presence of one such disease tends to be correlated with the presence of others.

(4) Two 1996 chlamydia titer tests on the plaintiff's blood revealed the presence of chlamydia antibodies, indicating an earlier chlamydia exposure or infection.

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67. *See Baker v. Dalkon Shield Claimants Trust*, 156 F.3d 248, 251 (1st Cir. 1998).

68. *See id.*

69. *See id.*

(5) The plaintiff's PID symptoms did not correspond to those that IUDs could cause.[70]

As the First Circuit explained, there was no dispute about the general causation theory — that chlamydia is a common cause of PID. Moreover, there was no dispute that the medical community considered titer tests reliable evidence of prior chlamydia infection. Thus, there was no basis for excluding the alternative causation theory as lacking in reliability or relevance. Unlike Dr. Jenkins, the defense experts in *Baker* undertook a logical, step-by-step exclusion of the other possible causes of the plaintiff's disease. They explained why the condition was more likely caused by chlamydia, to which the plaintiff had definitely been exposed.

b. In re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)

Paoli is a consolidated case involving multiple claims of 38 people who had developed cancer and other illnesses after living for many years near a railroad yard at which polychlorinated biphenyls (PCBs) had been used for decades.[71] This lengthy, fact-intensive opinion is one of the most comprehensive applications of *Daubert*. Unfortunately, because the Third Circuit did not have the benefit of this Court's later *Joiner* opinion, it incorrectly applied a heightened standard of review, which was later explicitly rejected in *Joiner*.

Like the Eleventh Circuit in *Joiner*, the Third Circuit reasoned that since a trial court's preliminary ruling could foreclose the case's submission to a jury, a circuit court should take a "hard look" at the trial court's exclusion of evidence, applying a "more stringent review" of the district court's exercise of discretion.[72] Because the Third Circuit applied an incorrect standard of review throughout this decision, there is no reason to address any perceived conflict created by later cases that apply the proper abuse-of-discretion standard approved by this Court in *Joiner*.

Moreover, even if the *Paoli* court had applied the proper standard, the opinion does not support the Petitioners' argument in this case. Contrary to their assessment, *Paoli* does not stand for the general

70. *See id.* at 252.

71. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 735 (3d Cir. 1994).

72. *Id.* at 749-50.

proposition that experience and differential diagnosis are always sufficient to support a clinical physician's causation testimony, regardless of other factors. In *Paoli*, after the defendants moved for summary judgment, the trial court conducted five days of in limine hearings and excluded as unreliable most of the plaintiffs' expert testimony. The trial court then granted summary judgment for the defendants on all claims. As the Third Circuit explained: "For the most part we will affirm the rulings and the judgment of the district court."[73] And to the extent that other rulings were overruled, the Third Circuit's holding was based on the now-rejected heightened scrutiny standard.

c. Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)

In *Ambrosini*, the parents of a child born with severe birth defects sued the manufacturer of Depo-Provera, a drug that the mother had used during pregnancy.[74] The trial court excluded the testimony of the plaintiffs' experts — an epidemiologist to testify on general causation and a teratologist (an expert on congenital malformations) to testify on specific causation.[75]

Although a divided panel of the D.C. Circuit found an abuse of discretion in these exclusions, it did not have the benefit of this Court's later *Joiner* opinion. Thus, like the Eleventh Circuit in *Joiner* and the Third Circuit in *Paoli*, the D.C. Circuit distinguished between reviewing the admission of scientific evidence and reviewing the exclusion of such evidence. As in a few other pre-*Joiner* decisions, the panel reasoned that since a trial court's preliminary ruling could foreclose a jury trial, its reasons for excluding scientific testimony "must be strong."[76]

This view directly conflicts with this Court's guidance in *Joiner*, which requires circuit courts to apply exactly the same broad abuse-of-discretion standard to rulings admitting expert testimony as to those excluding it.[77] Because the *Ambrosini* panel applied a more stringent

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73. *Id.* at 733.

74. *See Ambrosini v. Labarraque*, 101 F.3d 129, 131 (D.C. Cir. 1996).

75. *See id.* at 131-32.

76. *Id.* at 132.

77. *See Joiner*, 118 S. Ct. at 517.

review to the exclusion of the expert testimony, the case does not create an intercircuit conflict with later cases applying the proper standard.

Moreover, even if the *Ambrosini* two-member majority had applied the proper standard, the opinion does not support the Petitioners' overbroad interpretation of it. Contrary to their argument, *Ambrosini* does not stand for the proposition that "technical expertise and clinical experience and methodology" are always sufficient to support medical causation testimony, regardless of other factors.[78]

For example, the *Ambrosini* epidemiologist — unlike Dr. Jenkins — explained "how he arrived at his opinion that a positive causal connection exists between Depo-Provera and the type of birth defects suffered by [the child]."[79] Similarly, the teratologist — unlike Dr. Jenkins — "specifically identified the animal, pharmacological, and human studies that he relied on to reach the opinion that Depo-Provera caused [the] birth defects."[80] As the majority explained: "While some studies suggest no causal relationship between Depo-Provera and the types of birth defects suffered [here], others suggest a positive one."[81] No such studies existed in the present case.

In addition, the *Ambrosini* majority concluded that other indicia of reliability supported the causation testimony. For example, at the FDA's request, one of the experts had "testified to his opinion of general causation in a public hearing, without any connection to the Ambrosinis' litigation," thus reducing concern that he was "simply 'a gun for hire.' "[82] And in testifying in the case, this expert had specifically explained how he had ruled out all the other possible causes for the birth defects.

3. The *Kumho Tire* Issue of Nonscientific Testimony

Petitioners also discuss the Eleventh Circuit's opinion in *Carmichael*, now *Kumho Tire*, in which this Court has granted certiorari and heard oral argument. But *Kumho Tire* does not deal

78. *See* Pet. at 11.

79. *Ambrosini*, 101 F.3d at 136.

80. *Id.* at 137.

81. *Id.* at 138.

82. *Id.* at 139.

with medical causation testimony.[83] Instead, it deals with the legitimate split in the circuits over whether *Daubert* applies to nonscientific testimony.[84]

The Moores try to portray their case as a part of that conflict, arguing that, like the purported tire expert's testimony in *Kumho Tire*, Dr. Jenkins's testimony "is not based on hard science" and thus, "the *Daubert* factors do not apply."[85] But that argument overlooks the fact that both *Daubert* and *Joiner* dealt specifically with medical causation testimony. And contrary to Petitioners' argument, applying the *Daubert* factors to medical causation testimony — no matter what type of expert proposes to testify — comports with the overwhelming weight of authority from other circuits.[86] Thus, no matter how this

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83. *See Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), *cert. granted sub nom. Kumho Tire Co. v. Carmichael*, 118 S. Ct. 2339 (1998).

84. For cases applying *Daubert* to nonscientific testimony, *see, e.g., Watkins v. Telsmith, Inc.*, 121 F.3d 984, 989 (5th Cir. 1997) (applying *Daubert* to expert testimony, based on training and experience, concerning design of a conveyor); *Berry v. City of Detroit*, 25 F.3d 1342, 1348, 1350-51 (6th Cir. 1994) (applying *Daubert* to "nonscientific testimony" that a police department's alleged failure to discipline officers had proximately caused a shooting). For cases refusing to apply *Daubert* to nonscientific testimony, *see, e.g., Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994) (refusing to apply *Daubert* to "nonscientific testimony" in construction-contract case); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806-807 (9th Cir. 1997) (refusing to apply *Daubert* to mechanical engineer's "nonscientific testimony" concerning a forklift accident).

85. Pet. at 12.

86. In addition to the cases discussed in the text, see *Raynor v. Merrell Pharmaceuticals Inc.*, 104 F.3d 1371, 1374-76 (D.C. Cir. 1997) (excluding expert testimony on the cause of birth defects); *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1158-59 (4th Cir. 1996) (affirming exclusion of medical doctor's and toxicologists' opinions that aviation fuel vapors caused illness); *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 596-98 (9th Cir. 1996) (affirming exclusion of medical doctors' testimony in birth defects case); *Bradley v. Brown*, 42 F.3d 434, 436-38 (7th Cir. 1994) (affirming exclusion of doctors' multiple-chemical-sensitivity causation

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Court decides the question whether *Daubert* applies to nonscientific testimony, that decision should have no impact in the present case because medical causation testimony is plainly "scientific."

D. An alleged conflict with scholarly commentary or proposed rule changes provides no basis for granting certiorari.

Petitioners further argue that the en banc decision in this case conflicts with "scholarly commentary and the proposed amendment to Rule 702."[87] Petitioners fail to suggest how any such alleged conflict could possibly provide a basis for granting certiorari. Instead, this section of the petition consists of little more than a series of block quotations from various secondary sources, with no explanation of how the quotations supposedly conflict with the Fifth Circuit's en banc opinion.

In this section of their brief, Petitioners rely heavily on the work of two scholars: Professor Daniel J. Capra and Professor Michael H. Graham. As they note, Professor Capra "is the Reporter for the Advisory Committee on Evidence Rules for the Judicial Conference's Proposed Amendment to Rule 702."[88] But Petitioners apparently overlook a recent law review article by Professor Capra, in which he expressly rejects the now-vacated panel opinion that the Moores contend was correct.[89]

Referring to the *Moore* majority panel opinion as "disappointing," Professor Capra explains:

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testimony); *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 647-51 (8th Cir. 1994) (affirming exclusion of medical doctors' testimony concerning causation of birth defects by alfalfa tablets contaminated with EtO); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105-07 (7th Cir. 1994) (affirming exclusion of medical doctor's testimony regarding radiation as cause of cataracts); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 612-16 (7th Cir. 1993) (affirming exclusion of medical doctors' testimony on causal relationship between Ibuprofen and renal failure).

87. Pet. at 13.

88. Pet. at 14-16 & n.2.

89. *See* Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 749-51 (1998).

> The *Moore* panel's analysis is flawed because it permits a party to evade the requirements of hard science simply by calling a clinical expert who can testify to causation without having to rely on epidemiological evidence, animal studies, or any other of the bases ordinarily used by scientists. The fact that clinical medicine and laboratory medicine have different goals does not mean that a clinical doctor should be able to testify to causation on the basis of information that a laboratory scientist would reject as insufficient. The *Moore* court ignored the fact that clinical experts treat patients — they do not conclude definitely on causation in toxic tort situations. The *Moore* decision allows the clinical expert to testify in court to a conclusion that the expert would not and could not reliably draw in his professional life. Happily, the Fifth Circuit has granted en banc review in *Moore*, and hopefully the panel's error will be corrected.[90]

Just as Professor Capra had hoped, the majority panel's error was promptly corrected by the en banc majority decision.[91] Indeed, Professor Capra's reasoning is echoed in the en banc majority opinion: "determining the etiology of a disease — its cause — involves the same scientific exercise, whether the decision is made by a clinician, an epidemiologist, or other scientist."[92]

As for Professor Graham, the other scholar on which the Moores rely, his position can only be viewed as aberrant. In quoting extensively from Professor Graham's article, Petitioners fail to mention this critical point — the article's primary thesis is that *Daubert* was wrongly decided:

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90. *Id.* at 750-51 (citations omitted).

91. *See id.*

92. App. 12a n.6 (quoting the amicus brief of Professor Alvan R. Feinstein, Sterling Professor of Medicine and Epidemiology at the Yale University School of Medicine and author and co-author of more than 375 peer-reviewed articles and five scientific texts, including *Clinical Judgment*).

> *Daubert* is a very incomplete case if not a very bad decision. It does not, in any way, accomplish what it was meant to do . . . . *Daubert* can never work well as-is. The *Daubert* box must be removed.[93]

Thus, it is not surprising that Professor Graham cites favorably the *Moore* two-member majority panel opinion. Because Professor Graham specifically rejects this Court's opinion in *Daubert*, his article provides no assistance in evaluating the decisions of circuit courts that are striving to follow that binding authority.

E. The en banc Fifth Circuit's decision is correct.

1. The Fifth Circuit correctly refused to apply a less rigorous admissibility standard merely because the causation expert was a clinical physician.

According to Petitioners, the trial court and the en banc Fifth Circuit erred by failing to judge the reliability of the causation opinion by the typical approach used by clinical physicians. But in evaluating the admissibility of an expert's medical causation testimony, the standards of relevance and reliability do not vary depending on whether the expert is a medical doctor, a toxicologist, or some other type of scientist. If they did, plaintiffs would have every incentive to engage in a "race to the bottom" in selecting a medical causation expert.[94]

Instead of presenting the causation testimony of epidemiologists or toxicologists — scientists who specialize in determining medical causation — plaintiffs would routinely select clinical physicians or other medical providers, who would be allowed to base their medical causation opinions on nothing more than vague references to "clinical procedures" or unsupported reliance on "differential diagnosis."[95]

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93. Michael H. Graham, *The Daubert Dilemma: At Last a Viable Solution?*, 179 F.R.D. 1, 4, 18 (1998).

94. *Cf.* Capra, *supra* note 89, at 748-49 (noting that if less rigorous standards apply to the testimony of certain types of experts, then the result would be a "race to the bottom for experts").

95. *Cf.* App. 70a-71a (majority panel opinion) (in contrasting "hard science" with clinical medicine, noting that clinical physicians regularly rely on "ethics, compassion, and . . . a willingness to take responsibility in the face of the unknown").

Indeed, if the reliability standard plummets for experts who do not use the scientific method in their daily work, then a palm reader might be allowed to rely on an erratic "life line" to pinpoint the onset and cause of a plaintiff's cancer.

In *O'Conner v. Commonwealth Edison Co.*, the Seventh Circuit rejected a similar argument that clinical physicians' causation testimony should be evaluated under relaxed standards of reliability and relevance:

> Mr. O'Conner also seems to argue that, because Dr. Scheribel is a treating physician, he is exempt from the requirements of Federal Rules of Evidence 702 and 703. However, we do not distinguish the treating physician from other experts when the treating physician is offering expert testimony regarding causation.[96]

As the en banc majority concluded in the present case, there is simply no good reason that an expert's medical causation testimony should escape the *Daubert* analysis simply because he describes himself as a "clinical physician."

Contrary to Petitioners' suggestion, the exclusion of Dr. Jenkins's causation opinion was not a challenge to his credentials or his accomplishments as a clinical physician. Exactly as in *Daubert*, the trial court was not called upon to rule upon expert qualifications. Instead, it was required to determine whether the causation opinion that the Moores proposed to put into evidence was "scientific knowledge," as defined in *Daubert*.

As proponents of the evidence, the Moores had the burden of proving its admissibility.[97] Yet, given two opportunities to demonstrate that Dr. Jenkins had a reliable basis for his causation opinion, the Moores failed to offer evidence that would sustain a finding of reliability and "fit." The trial court was thus faced with a situation similar to that in *Rosen v. Ciba-Geigy Corp*, where the Seventh Circuit

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96. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 n.14 (7th Cir. 1994).

97. *See Daubert*, 113 S. Ct. at 2796 n.10 (citations omitted); *Lust*, 89 F.3d at 598; *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 139 (6th Cir. 1995).

affirmed the trial court's decision to exclude the testimony of "a distinguished cardiologist and department head at the University of Chicago."[98] Writing for the court, Chief Judge Posner noted that a district court "must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." The Fifth Circuit did not err in concluding that the trial court acted within its broad discretion in excluding a portion of Dr. Jenkins's "unscientific speculation."

2. The Fifth Circuit correctly refused to limit *Daubert*'s applicability to cases involving "junk science" or to experts labeled "hired guns."

Petitioners argue that the *Daubert* requirements were intended to exclude "junk science."[99] From this proposition, they reason: "Since junk science was not involved here, the court of appeals' analysis was wrong."[100] But *Daubert* itself refutes that argument: "we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence."[101]

Similarly, Petitioners suggest that the *Daubert* requirements are somehow limited to determining whether the expert is, on the one hand, a "hired gun," or on the other hand, a person whose opinion is accepted in his field.[102] But a "hired gun" is merely a shorthand term for an expert who has developed an opinion expressly for purposes of testifying.[103] That is, before the plaintiff's case arose, the expert had never expressed the opinion in any book, article, or speech. This failure to previously acknowledge a theory — especially a general causation theory — is merely one indication that the testimony may

98. *See* 78 F.3d 316, 318 (7th Cir. 1996).

99. *See* Pet. at 20.

100. *Id.*

101. *Daubert*, 509 U.S. at 592 n.11, 113 S. Ct. at 2796 n.11.

102. *See* Pet. at 20.

103. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (noting that a "very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying").

lack scientific reliability.[104] While Dr. Jenkins may have examined Mr. Moore before this suit was filed, his testimony in this case was his first public expression of his general causation theory — that exposure to any irritant, at unknown levels, can cause RADS.

Daubert's purposes certainly include keeping "junk science" out of the courtroom, along with the expert testimony of "hired guns," whose opinions are formulated solely to support a litigant's case. But contrary to the Moores' suggestions, these policy matters do not in any way limit *Daubert*'s applicability in this case.

F. The en banc Fifth Circuit properly applied an abuse-of-discretion review to the trial court's evidentiary ruling.

Parroting the en banc dissent's analysis, Petitioners argue that the Fifth Circuit majority reviewed the trial court's exclusionary ruling under a de novo, rather than an abuse-of-discretion, standard.[105] As demonstrated above, this is simply not true.[106] The Fifth Circuit correctly reviewed the trial court's rulings under the standard announced by this Court in *Joiner* and properly detailed the reasons why the district court was entitled to conclude that Dr. Jenkins's causation opinion was unscientific and unreliable.[107]

Moreover, Petitioners fail to recognize the fatal flaw in their argument. If the review was more stringent than required under *Joiner*, and the en banc court actually conducted a de novo review and affirmed 12 to 3 the exclusion of the causation opinion, then the same result would necessarily follow under the more deferential abuse-of-discretion standard.

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104. *See* Capra, *supra* note 89, at 709 (noting that this factor is especially important "on issues of general causation" — does a certain substance cause a certain harm? — because "[o]ne could expect a scientist to research that general question as a scientist and not as an expert witness").

105. Pet. at 22-27, App. 44a-50a.

106. *See* subsections A and B of "Reasons for Denying the Writ," *supra*.

107. App. 17a-21a.

CONCLUSION

The Fifth Circuit's opinion correctly applies recent guidance from this Court on the admissibility of medical causation testimony and on the standard of review for such admissibility rulings. This decision does not conflict with any decision of this Court, does not create a conflict with the decisions of other circuit courts of appeals, and does not meet any of the other criteria for certiorari review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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